STATE OF MICHIGAN

COURT OF APPEALS

DEAN MUGIANIS and JENNIFER MUGIANIS,

Plaintiffs-Appellants,

v

CITY OF WALLED LAKE, PADDOCK BUILDERS, INCORPORATED, MICHAEL KERNAN, and MILFORD SALVAGE, IRON & METAL COMPANY,

Defendants-Appellees.

UNPUBLISHED
April 20, 2006

No. 266339
Oakland Circuit Court
LC No. 2004-060460-NO

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's grant of summary disposition in favor of defendants. We affirm.

On August 17, 2004, plaintiffs filed their complaint against the City of Walled Lake for injuries sustained by plaintiff Dean Mugianis[1] on May 11, 2004, when he allegedly drove his bicycle into a hole that was filled with standing water, which was located on a public sidewalk, causing him to fly over the handlebars and strike the sidewalk with his head. Plaintiffs averred that the City breached its statutory duty to maintain its sidewalks in reasonable repair, and was negligent in allowing the condition to exist, as well as for failing to warn of the danger. Shortly thereafter, the City filed its motion for summary disposition, arguing that it was immune from liability because it did not have a duty to keep the sidewalk reasonably safe through the use of barricades and because plaintiffs did not establish that it had actual or constructive notice of the alleged defect.

[1] Because Jennifer Mugianis' claim is derivative, our reference to "plaintiff" refers to Dean Mugianis.

Plaintiffs responded to defendant's motion for dismissal, arguing that the motion was premature because discovery was far from completed. Nevertheless, plaintiffs argued, the City was not immune from liability because it had a duty to keep the sidewalk reasonably safe and the City had actual or constructive notice as evidenced by the fact that city inspectors were frequently at the site because a home was being demolished and a new one constructed. While pending, a stipulated order was entered allowing plaintiffs to amend their complaint to add defendants Paddock Builders, Inc, Michael Kernan, and Milford Salvage, Iron & Metal Co. Thereafter, plaintiffs' first amended complaint was filed, which alleged that (1) Paddock and Milford Salvage were negligent during their demolishing of an old home and constructing of a new home in that they had caused damage to the sidewalk and allowed it to exist without warning or barrier, and (2) Kernan, as the property owner, was negligent in allowing the unsafe condition to exist, without warning or barriers. Because of the addition of these three defendants, the trial court denied the City's motion for summary disposition as premature.

On July 13, 2005, plaintiffs were granted leave to file their second amended complaint to add defendant Michael Kernan's wife, Ame Kernan, as a defendant and to add a loss of consortium claim. On July 14, 2005, the City filed its second motion for summary disposition, arguing that it was entitled to immunity because the bicycle trail that plaintiff was riding his bicycle on was not a "sidewalk" within the contemplation of the highway exception and, if it was, the City had no duty to keep it reasonably safe. Further, the City argued, plaintiffs failed to establish how long the alleged defect existed or that the City had either actual or constructive notice of the defect before plaintiff suffered his injuries. On July 22, 2005, defendant Kernan filed his motion for summary disposition, arguing that he did not owe a duty to plaintiff because the alleged defect, a "gap in the sidewalk," was open and obvious as evidenced by plaintiff's admissions that he saw the gap before coming into contact with it, nothing was obstructing his view, and he was familiar with the neighborhood. Further, defendant Kernan presented an affidavit indicating that construction barricades were present and fully visible on the day of the incident.[2]

On August 15, 2005, plaintiffs responded to the City's second motion for summary disposition, and described the accident as occurring because a portion of the sidewalk was completely missing, but the defect was concealed by a large puddle. Apparently, when plaintiff drove through the puddle, he hit a gap where the sidewalk should have been, causing him to be thrown over the handlebars of his bicycle. Plaintiffs argued that the City was liable because it "should have placed barriers around a huge and concealed gap of sidewalk" as part of its duty to maintain the sidewalk in reasonable repair so that it was reasonably safe. Further, because a portion of the sidewalk was missing, it was not "maintained," "reasonably repaired," or "reasonably safe." And, contrary to the City's argument, the sidewalk was not a "bicycle trail,"

[2] On August 30, 2005, defendant Paddock filed its concurrence in co-defendant Kernan's motion for summary disposition. On September 1, 2005, defendant Milford Salvage filed its concurrence in co-defendant Kernan's motion for summary disposition.

as evidenced by the City's Director of Planning and Building's reference to it as a "sidewalk," as well as the fact that it runs in front of residential homes. Finally, plaintiffs argued, the City had notice of the condition as evidenced by defendant Kernan's testimony which included that (1) the sidewalk had been unsalvageable since at least June of 2003, (2) the demolition company, Milford Salvage, removed the portion of the sidewalk at issue when they removed the driveway and the City inspectors would have inspected the area, and (3) the City's water department worked on a water main in the area where the sidewalk had been and created a very large hole there in late 2003 or early 2004.[3] Therefore, there existed at least a question of fact as to the City's actual or constructive notice of the defect.

On August 15, 2005, plaintiffs also responded to defendant Kernan's motion for summary disposition, arguing that the defective condition was not open and obvious because the condition was hidden, i.e., completely covered by dirty water. Plaintiffs argued that "[i]t is not within the common knowledge of anyone to expect that what appears to be merely a puddle, is really a gap in what is otherwise a continuous sidewalk." Plaintiffs refer to photographs attached as exhibits but they are poor black and white copies and it is impossible to discern from them the alleged defective condition.

Defendant Kernan filed a supplemental brief in support of his motion for summary disposition, indicating that the recent deposition testimony of co-defendant Paddock's project manager included that during the demolition and construction project, a 2 to 3 foot tall black silt fence surrounded the entire property, pursuant to Code, to alleviate soil erosion. Defendant argued that the testimony was further evidence that any hazard in front of his house was open and obvious.

On September 14, 2005, the trial court considered the motions for dismissal and appears to have concluded that plaintiffs failed to establish a genuine issue of material fact as to whether the City had actual or constructive notice. The court relied on plaintiff's testimony which included that he had lived in the area, had gone through the area many times before and never saw anything like it. The court also noted that neither Paddock, the builder, or Milford Salvage, the demolition company, recalled seeing the alleged condition prior to May 11, 2004. Therefore, the City's motion was granted on the ground that it lacked notice of the condition. Next, the court considered co-defendants' open and obvious argument and agreed that the condition was open and obvious. The court noted that the puddle of water was clearly discernable and a reasonable person would know that water puddles because of a depression of some sort and, unless you can clearly see the cause of it, should be avoided. Orders dismissing the claims were entered accordingly. Thereafter, plaintiffs' motion for reconsideration, which merely raised the same arguments, was denied. This appeal followed.

[3] It should be noted that plaintiffs attached the deposition transcripts of Michael Kernan and plaintiff to their responsive brief. In both transcripts numerous references are made to photographic exhibits that depict the allegedly defective condition, however, those exhibits are not included. Without these exhibits, it is very difficult for this Court to follow the testimony or visualize the alleged defect.

Plaintiffs argue that the City was not entitled to summary disposition on the ground of governmental immunity because there was, at least, a question of fact as to whether it had actual or constructive knowledge of the defective state of the sidewalk. After review de novo, we disagree. See MCR 2.116(C)(7); *Pierce v Lansing*, 265 Mich App 174, 176-177; 694 NW2d 65 (2005).

Governmental agencies engaged in the exercise of a governmental function are immune from tort liability with five exceptions, including the highway exception. See MCL 691.1401 *et seq*.; *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156-157; 615 NW2d 702 (2000). The highway exception requires that governmental agencies with jurisdiction over a highway "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). Persons sustaining bodily injury or property damage because of the failure to meet this requirement may recover for the damages suffered. *Id*. Under MCL 691.1401(e), the definition of "highway" includes sidewalks on the highway. However, the highway exception to governmental immunity is narrowly drawn and an action may not be maintained unless it is clearly within the scope and meaning of the statute. See *Hatch v Grand Haven Charter Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000). And, pursuant to MCL 691.1402a(1)(a), the governmental entity must have had notice of the condition, specifically:

> At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.

Plaintiffs argue that defendant Kernan admitted in his deposition that the sidewalk was in a state of disrepair and was unsalvageable in June of 2003, prior to its removal; thus, the City should have known about the dangerous condition long before the incident. Further, Kernan testified that when the demolition company removed the driveway, they also removed a portion of the sidewalk. Then, in late 2003 or early 2004, the City's water department worked on the water main in the area where the sidewalk had been, thus, the City had actual or, at least, constructive notice of the missing portion of sidewalk.

We agree with the trial court and reject these arguments as insufficient to establish a genuine issue of material fact that the City had notice of the defect that purportedly caused plaintiff's injuries. In opposing the motion for summary dismissal, plaintiffs were required to present admissible evidence to show the existence of a disputed fact as to the issue of notice that is not based on speculation and conjecture. See *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002); *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

First, that the sidewalk was in a poor state before a portion of it was removed is irrelevant to the issue whether the City had notice of the defective condition that allegedly caused plaintiff's injuries. Second, even if the portion of the sidewalk involved in the accident was

removed when defendant Kernan's driveway was removed—which is hard to discern because plaintiffs have not provided this Court with one clear picture of the alleged defect or a dated work order, invoice, or receipt—that fact does not lead to a reasonable inference that the City had notice of the removal. For example, plaintiffs have provided no evidence of city inspections related to the new construction or the driveway installation. Third, plaintiffs have provided no evidence to substantiate or corroborate Kernan's speculative testimony as to when the City's water department performed work on Kernan's property and exactly where that work was performed on the property. The trial court noted this lack of evidence supporting an inference of notice, actual or constructive, when it indicated that neither the demolition crew nor the construction crew noticed the purported defect. And, in fact, as the trial court noted, plaintiff, who testified that he lived in the area and had been through there many times, had "never seen anything like that." Thus, plaintiffs have provided little more than speculation and conjecture as to when the allegedly defective condition occurred and how long it existed; therefore, they have failed to establish a genuine issue of material fact as to whether the City knew or should have known about the condition. Accordingly, summary disposition as to the City, on the ground of governmental immunity, was properly granted. See MCR 2.116(C)(7).

Next, plaintiffs argue that a genuine issue of material fact existed as to whether the allegedly defective condition was open and obvious, thus precluding the summary dismissal of their claims against the remaining defendants. After review de novo, we disagree. See MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 118, 120; 597 NW2d 817 (1999).

A danger is considered open and obvious if it is reasonable to expect an average person of ordinary intelligence to discover the danger and the risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Thus, it is an objective test and the focus is on whether a reasonable person in the plaintiff's position would foresee the danger, not on whether a particular plaintiff should have foreseen the danger. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004).

Plaintiffs argue that the missing section of sidewalk that caused plaintiff to fall was not open and obvious because that condition was completely covered in standing water, i.e., the danger posed by the missing sidewalk section was hidden. But, we disagree with plaintiffs' characterization of the dangerous condition as consisting only of the missing sidewalk section—the allegedly dangerous condition was the combination of both the missing sidewalk section and the large puddle of water that covered and surrounded the area. As the trial court noted, typically, puddles of water form because there is a void of some depth that water naturally gravitates to and fills. The depth of the void could be very small or very large and is usually not determinable until one is either in the puddle or standing over a puddle containing clear or shallow water—that is just one of the hazards posed by a puddle. Puddles are also potentially hazardous because they conceal conditions other than the void, including for example slippery mud, ice, sharp objects, live electrical wires, uneven pavement, etc. In other words, one cannot reasonably assume that a common puddle is, in all cases, a safe place to walk, ride, or run through. Thus, when a person is injured because of a dangerous condition that was located within the body of a puddle, a court cannot just consider that dangerous condition in isolation from the fact that the condition would not have been confronted if the person had not purposely walked, ran, or ridden through the puddle, itself a potentially hazardous condition.

Here, plaintiff rode his bicycle through a large puddle, hit the edge of a gap created by a missing sidewalk section, was thrown off of his bike, over his handlebars, and landed on his face. Plaintiff admitted in his deposition that he saw the puddle and proceeded to ride through it. As the trial court opined, we too conclude that a reasonable person in plaintiff's position would have anticipated or foreseen the danger of riding through a puddle of unknown depth and composition and avoided the danger. In other words, a reasonable person would expect that a puddle of water could contain a potentially hazardous condition, like the hole at issue here, and would guard against the danger it posed by avoiding the puddle. Therefore, the condition was open and obvious. Because plaintiffs failed to establish a genuine issue of material fact as to whether the condition was open and obvious, we conclude that summary disposition was properly granted.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald